Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of the Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures	)))))	RM-11293

REPLY COMMENTS OF
LEVEL 3 COMMUNICATIONS, INC.

Level 3 Communications, Inc. ("Level 3"), by undersigned counsel and in response to the Commission's Public Notice released November 2, 2005,[1] files these Reply Comments on the Petition for Rulemaking filed by the United States Telecom Association ("USTA").

I. Introduction and Summary

Level 3 is a leading global communications company, operating one of the world's newest and most advanced telecommunications platforms. Completed in 2001, the Level 3 network spans approximately 23,000 intercity route miles and delivers services to customers in major markets across the United States and Europe. Level 3 serves the world's largest and most sophisticated communications companies, including interexchange carriers, local phone companies, European PTTs, cable operators, ISPs, wireless companies, and Internet content providers.

Level 3 is a non-dominant carrier that is authorized to provide resold and facilities-based telecommunications services nationwide pursuant to certification, registration or tariff requirements, or on a deregulated basis, as appropriate in each jurisdiction. Level 3 is also authorized by the Federal Communications Commission ("FCC" or "Commission") to provide

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[1] *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed*, RM 11293, Public Notice (Nov. 2, 2005).

international and domestic interstate services as a non-dominant carrier. As an owner of conduit and a local exchange carrier, Level 3 is a "utility" under Section 224 of the Communications Act of 1934, as amended ("Act").

Level 3 agrees with the statutory analysis included in the majority of comments filed in opposition to the USTA Petition for Rulemaking. The plain language of Section 224 makes clear that Congress did not intend ILECs to gain access to the poles, ducts, or conduit (hereafter "Conduit") of utilities at the rates prescribed by Section 224(e). Level 3 files these Reply Comments to emphasize that any action the Commission takes in response to USTA's Petition would affect all utilities that own Conduit, not just electric utilities. As a competitive carrier that has financed its own network in the United States and abroad through capital and debt raised in the financial markets, rather than through captive ratepayers, Level 3 is a prime example of why Congress felt it would be inappropriate to grant ILECs a right to access Conduit of a provider such as Level 3 at a presubscribed rate.

Granting the relief sought by USTA would also be poor public policy. USTA has acknowledged that ILECs have no statutory right to access a utility's Conduit. If the Commission nevertheless determined that once granted access, ILECs would be entitled to pay no more than Commission-presubscribed rates, Conduit owners would have very little incentive to grant access to ILECs. Thus, granting USTA's Petition would actually harm competition, rather than promote it.

USTA's requested relief both violates the Act and is against public policy. Therefore, the Commission should deny the Petition.

II. The Plain Language of the Statute Precludes ILECs from Demanding Rates Presubscribed Under Section 224(e)

Level 3 agrees with the majority of commenters that the Act cannot be read to grant

ILECs access to utility Conduit at the rates prescribed under Section 224(e).[2] Section 224(a)(5) defines "telecommunications carrier" to exclude ILECs. Section 224(e) provides that only telecommunications carriers are entitled to the rates prescribed by the Commission. The law is clear that Congress did not intend ILECs to obtain rates subject to regulation by the Commission. Where the intent of Congress is clear, the Commission has no discretion to interpret the Act to the contrary.[3]

Although the inquiry should end there, USTA tortures the interpretation of the Act to gain leverage for ILECs over other entities that own or control Conduit. It first argues that although Section 224 does not grant ILECs a right of access to Conduit, it requires the Commission to prescribe just and reasonable rates for pole attachments offered to ILECs.[4] It next argues that when resolving disputes concerning the "just and reasonable" rate, the benchmark or default rate should be the prescribed rate for CLECs because the Act "leaves open whether a single rate formula should be applied to the attachments of ILECs and CLECs."[5]

As an initial matter, USTA's proposed interpretation of the Act is wrong. Adopting USTA's tortured statutory construction would defeat the express intent of Congress to *exclude*

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[2] *See, e.g.,* Opposition of First Energy Corporation to Petition for Rulemaking of United States Telecom Association (filed Dec. 2, 2005) at 7-11; Comments of the United Telecom Council and the Edison Electric Institute (filed Dec. 2, 2005) at 5-11; Comments of Exelon Corporation (filed Dec. 2, 2005) at 3-5; Statement in Opposition of Ameren Corporation, *et al*. (filed Dec. 2, 2005) at 5-9, *in re Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed*, RM 11293, Public Notice (Nov. 2, 2005).

[3] *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-3 (1984).

[4] Petition of The United States Telecom Association For a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures (filed Oct. 11, 2005) ("Petition" or "USTA Petition") at 6-10.

[5] *Id.* at 17.

ILECs from the benefit of the rates prescribed by Section 224(e). In short, by definition, Congress has determined that ILECs and CLECs are not similarly situated customers entitled to "like" rates. The "unreasonable discrimination" USTA complains of[6] has been sanctioned by Congress. The Commission may not defeat the intent of Congress by adopting USTA's tortured interpretation of the Act.

III. USTA and ILECs Substantially Understate the Bargaining Power of ILECs, and Demand Relief from a Distorted Perception of Unfairness

In this proceeding, ILECs ask the Commission for relief from purportedly unfair discrimination that they suffer under the Commission's current rules. USTA, in its Petition, complains of the "unfair and anticompetitive" effect of the rule that prevents ILECs from demanding the same rates that CLECs are paying.[7] In reading the comments filed in this proceeding, one might reach the conclusion that the USTA Petition for Rulemaking represents only a clash between the interests of electric utilities and incumbent local exchange carriers. That misperception originates from the outset, in USTA's Petition, which describes the problem as arising from ILECs being required to obtain attachment rights from energy utilities with greater bargaining power, a claim that is perpetuated in comments filed by ILECs and their industry associations.[8]

Level 3 does not believe that any of the ILECs or their industry representatives have demonstrated convincingly in their comments that ILECs have significantly less bargaining power than any electric utility. Given the fact that most municipalities will not permit the erection of duplicative poles, joint use of existing structures is crucial. With that as the reality, a

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[6] *Id.* at 10-13.

[7] USTA Petition at 11.

[8] *See, e.g., id.* at 11, 12, 15; BellSouth Corporation Comments in Support of USTelecom Petition for Rulemaking, *in re* USTA Petition (RM 11293) ("BellSouth Comments") at 11.

party does not need to own 50 percent of the poles in order to have leverage with other joint users.[9] An ILEC may own or control somewhat less than a majority of the poles, and still have significant bargaining power with the electric utility. However, even assuming arguendo that there are some service areas in the United States where small ILECs are without leverage against large electric utilities, the Commission should not react to that situation by granting large ILECs the benefit of the Commission's rate formula as a default position. ILECs would attempt to use that leverage against CLECs such as Level 3, who own or control Conduit and also are classified as utilities under Section 224. None of the ILECs or their industry representatives have suggested in their comments that they would accept the just and reasonable rate formula in every case. Rather, BellSouth expresses the obvious goal of the ILECs, which is to attain the power of regulatory arbitrage. If granted the rights requested in the USTA Petition, ILECs will have the power to negotiate favorable rates with other utilities whenever they have significant leverage to do so, and rely on the formula in all other cases.[10] That luxury would not be equally available to CLECs, because CLECs own or control virtually no poles, and a comparatively small amount of conduit. By "picking and choosing" their approach to acquiring access, ILECs would achieve an overall advantage in the total cost of their Conduit resources. Clearly, ILECs' arguments of unfairness vis-à-vis CLECs are not persuasive.

The USTA Petition represents a threat to revenues of CLECs which have elected to construct their own Conduit. Some, like Level 3, are principally telecommunications providers that have constructed spare Conduit with the expectation of selling or leasing it for additional

[9] A research paper submitted with the BellSouth comments estimates that ILECs typically own 0-30% of joint use poles, but acknowledges that the percentage may exceed 30% in some cases. *See* Veronica Mahanger MacPhee & Mark Simonson, *Two Wrongs Don't Make a Right: The Electric Industry's Exploitation of its Captive Pole User Market* (Mahanger Consulting Associates, 2005) (submitted with BellSouth Comments as Attachment A) at 7.

[10] *See* BellSouth Comments at 11-12.

revenue. Other CLECs may be primarily in business to construct and manage structures for other carriers. USTA's proposed change in the Commission's rules would subsidize the rates ILECs would pay for such facilities, threatening the viability of a conduit leasing business. Notwithstanding the limited CLEC participation in this proceeding, the Commission must also keep in mind that the term "utility" in section 224 includes all local exchange carriers that own or control Conduit. As is evidenced by the purpose and the terms of the Telecommunications Act of 1996 ("1996 Act"), ILECs are always in a superior bargaining position vis-à-vis CLECs. The Act therefore delineates in painstaking detail the rights of access, and rates, that ILECs must offer CLECs in order to open local markets to competition. Any interpretation of Section 224 that would give ILECs similar rights to access CLEC Conduit at regulated rates would be antithetical to the purpose of the 1996 Act.

IV. Adopting USTA's Interpretation Would Diminish Competition

Even assuming arguendo that once ILECs are voluntarily granted access to Conduit then they are entitled to the rates prescribed by Section 224(e), it is clear that granting ILECs such rights would diminish competition. As explained in Section V below, Level 3 has constructed its network by raising debt and equity in the capital markets, not by funding it through captive ratepayers. Level 3 provides its customers, including ILECs, with a valuable, state-of-the-art network under mutually agreeable, arms-length negotiated prices. However, if Level 3, or any other CLEC for that matter, were required to offer its ILEC customers non-market based rates for access to Conduit, it would be unlikely to voluntarily offer such access if the mandated rate was below the market-negotiated price. Accordingly, any policy that prescribes rates once access is voluntarily granted would effectively ensure that access is seldom, if ever, voluntarily granted. Contrary to USTA's arguments, adopting its tortured interpretation of Section 224 would

diminish competition. Rather than obtaining voluntary access to CLEC networks such as Level 3's, ILECs would be forced to construct their own duplicative networks at costs that would greatly exceed the market-based rates they presently negotiate absent such a tortured regulatory policy.

V. Congress Concluded that ILECS Do Not Require the Protection of Regulated Rates

The comments filed by ILECs and their industry associations in support of USTA's Petition complain of unreasonable demands by energy utilities, and claim that ILECs have an inferior bargaining position when negotiating with Conduit owners for attachment rights.[11] In fact, it is the leverage that all incumbent pole and conduit owners have over newer telecommunications entrants (and cable television systems) that is the focus of Section 224, whether the Conduit owners are telephone, electric, gas, water, steam or other public utilities. Section 224 was a crucial part of Congress's intent to neutralize the competitive advantage inherent in incumbent carriers' ownership of the physical structures required to supply telecommunications services.[12]

Level 3 has spent more than $13 billion constructing a conduit and cabling system throughout the United States and many other parts of the world. Unlike the incumbent providers, who owned and controlled pole and conduit structures in 1996, Level 3 had no existing customers when it began building its network, and to this day has no customers who are without alternatives to Level 3's facilities and services. Without any assurance that its expenditures would be recoverable, Level 3 has built its Conduit system with capital and debt raised in private financial markets. Private markets are the only funding mechanism available to CLECs, a fact

[11] BellSouth Comments at 11; NTCA Comments at 2.

[12] *See, e.g., U. S. West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1051-52 (9th Cir. 2000).

that was well recognized by Congress when it decided to extend pole and conduit access rights and rate limitations only to CLECs and cable television providers. This truism is reflected in the following record of Senate debate on June 15, 1995, in which now-retired Senators Hank Brown, Larry Pressler and Fritz Hollings discussed an amendment to Section 224 that had been submitted by Senator Brown, one year before the 1996 Act:

> Mr. BROWN. Mr. President, I filed an amendment No. 1320, that addresses the part of the bill which amends existing law regarding pole attachments. Under the bill, all utilities are required to open up their poles, ducts, conduits or rights-of-way to other telecommunications carriers on a cost basis. Of course, there are exceptions to this. I filed an amendment which would have removed that obligation for nondominant telecommunications carriers. In other words, no nondominant telecommunications carrier would have to provide access on a cost basis. Instead, they would offer access on a free-market basis.
>
> The reason this amendment was filed is straightforward. I can understand requiring the incumbent monopoly to provide access on a cost basis, since the captured rate payers funded the construction. But, I cannot understand requiring other, competitive providers to provide access on a cost basis-particularly if their business is largely in providing access to those very same conduits on a market basis.
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> There are competitive telecommunications businesses that have laid lines and built a long distance service through hard work and purely private capital. There are telecommunications businesses that have focused on laying conduit or lines for purposes of leasing or selling that capacity. The obvious problem would arise if these businesses that focus on selling capacity lose any chance of profit because they must provide access on a cost basis. I do not think the bill should apply to them, but I am not sure that it does not.
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> I am sure that the intent of this section was not to burden competitive carriers that are in the business of providing capacity. I ask the managers if they agree with me that this was not the intent of the section?
>
> Mr. PRESSLER. That is right.
>
> Mr. HOLLINGS. I agree with the Senator.[13]

[13] TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT, SUBMITTED AMENDMENT NO. 1320, 141 CONG. REC. S 8460 (1995). Although Senator Brown did not offer his amendment, Senator Pressler stated that "I agree with [Senator Brown] that there may be unwanted inequitable result from this section and I will work to solve this potential

The rule change proposed by USTA would turn Section 224 on its head, requiring CLECs to either deny ILECs access to their Conduit or extend cost-based rates to ILECs. Ironically, if the Petition were granted, it is the ILECs, who were among the incumbent pole owners that Congress recognized prior to 1996 as having unfair bargaining power over CLECs and cable television companies, who would attain the most favored position of all. The Commission should not allow the Petition to subvert the law in what appears to be a dispute between electric utilities and ILECs over access pricing in joint pole use agreements.

VI. Conclusion

As discussed above, the statutory analysis presented by USTA in support of its petition is invalid. Congress specifically excluded ILECs from any right of access to Conduit and Section 224 does not allow ILECs to claim the right to regulated rates under Section 224(e) if they do obtain access to Conduit of other utilities. Nor would it make sense from a policy perspective to give ILECs a right to regulated rates. The commercially negotiated rates provide the best opportunity for ILECs to obtain reasonable rates, terms, and conditions of access. If the FCC were to establish an ILEC right of access to CLEC Conduit at cost-based formula rates, such a step would stifle CLECs' incentives to engage in the facilities-based competition that Congress intended. This Petition appears to be a ruse for the ILECs to obtain leverage in their negotiations with other utilities concerning joint use agreements. However, ILECs do not need any help from regulators in this area as they are themselves owners of vast resources of Conduit that other utilities need to access. Accordingly, the Commission should deny the Petition.

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problem in conference." Senator Hollings stated that "I, too believe that there may be a potential problem and will work to solve this problem in conference with the House." *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linda Crelling, do hereby certify that on this 19th day of December, 2005, I caused to be served a true and correct copy of the foregoing Reply Comments of Level 3 Communications, Inc. by electronic filing or U.S. mail to the following:

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